Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
October Term, 1992

AMERICAN HOME ASSURANCE COMPANY,
Petitioner,

v.

REPUBLIC INSURANCE COMPANY AND UNITED NATIONAL INSURANCE COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Pursuant to the substantive law of the State of New York must an excess insurer demonstrate prejudice when advancing a defense of late notice of loss.

II. Did the Court err by applying New York law in the absence of significant contacts with New York State.

III. Did the district court obtain jurisdiction over the parties pursuant to 28 U.S.C. § 1332.

IV. Does the presence of mitigating factors preclude summary judgment pursuant to the Insurance Law of the State of New York.

LIST OF PARTIES

The only parties to this action are listed in the caption. American Home Assurance Company is a subsidiary of American International Group. There are no subsidiaries of American Home Assurance Company.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

—

AMERICAN HOME ASSURANCE COMPANY,

Petitioner,

v.

REPUBLIC INSURANCE COMPANY AND UNITED NATIONAL INSURANCE COMPANY

—

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

—

American Home Assurance Company ("American Home") petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit which was entered on January 22, 1993.

review the judgment of the Court of Appeals for the Second Circuit which was entered on January 22, 1993.

OPINIONS BELOW

The opinion of the court of Appeals for the Second Circuit is reported at 984 F.2d 76 (App A). The opinion of the United States District Court, Southern District of New York is reported at 788 F. Supp. 214 (App. B).

JURISDICTION

The court of appeals entered judgment on January 22, 1993 (App. C). This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Rule 56(c) of the Federal Rules of Civil Procedure which relates to summary judgment, provides in part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

28 U.S.C. § 1332 provides in part:

> (a) The District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between -
>
> (1) citizens of different States;
>
> . . .
>
> (c) For the purposes of this section and section 1411 of this title -
>
> (1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.

STATEMENT

American Home seeks in an individual capacity and/or as equitable subrogee of Mobile Gas Service Corporation ("Mobile Gas") to recover monies expended on behalf of United National Insurance Company

("United") and Republic Insurance Company ("Republic") in settlement of claims brought against a mutual insured. American Home, United and Republic insured Mobile Gas as quota share participants on a second excess layer of coverage in the amounts of $4,000,000, $1,000,000 and $1,000,000, respectively. The entire second excess layer of coverage amounted to $10,000,000 which was comprised of other quota share participants. The applicable layers of coverage beneath the second excess layer were: first layer of excess coverage in the amount of $5,000,000 on which American Home was the sole insurance carrier and $300,000 primary insurance provided by Liberty Mutual Insurance Company.

On December 23, 1985, five individuals asphyxiated in the State of Alabama as a result of inhaling combustion gases emanating from a Luxaire heating unit which was serviced by Mobile Gas, an Alabama corporation operating in the State of Alabama.

On October 23, 1986, subsequent to the tender of the primary insurance carrier's policy American Home met with all plaintiff's counsel for the Estates of the deceased to engage in settlement negotiations in connection with its obligations pursuant to its first excess layer of coverage ($5,000,000).

On October 23, 1986, American Home's representative was advised that all plaintiffs counsel were unwilling to settle their claims against Mobile Gas for a sum less than $12.5 Million (said amount being in excess of $5 Million first layer coverage). Five days later, on October 28, 1986, American Home placed United and Republic on notice of the claim due to the potential exposure to their coverage on the second excess layer. Notice was given by way of: a "form notice"; a letter providing notice and details of the claim; and, an in-depth status report as to the mutual insureds liability and recommendations for

disposition of the claims all dated October 28, 1986. United and Republic never responded to the notices.

On December 22, 1986, American Home further advised United and Republic of the status of negotiations, stating in correspondence that it intended to meet with all plaintiff's counsel in order to negotiate a settlement for up to $12.5 million on December 30, 1986. Once again, United and Republic never responded.

On December 30, 1986, American Home on behalf of all second layer excess carriers (as well as itself as a first layer excess carrier) successfully negotiated a settlement of the claims against the mutual insured in the amount of $11.5 million. On January 7, 1987, American Home notified in writing United and Republic, of their respective monetary obligations of United and Republic in accordance with the proposed settlement. United and Republic did not respond to this communication and subsequently refused to participate in the settlement.

American Home began this action in the Supreme Court of the State of New York, County of New York, seeking to recover all monies expended on behalf of United and Republic in the settlement of the claims against the mutual insured, as well as interest and punitive damages. On motion of United and Republic, the action was removed to the United States District Court for the Southern District of New York based upon the allegation of diversity of citizenship.

Pursuant to 28 U.S.C. § 1332(a), United and Republic moved before the District Court for summary judgment, alleging late notice of the claim as a complete defense. American Home opposed summary judgment on the basis that notice was timely and that United and Republic as excess carriers must demonstrate actual prejudice to prevail on their defense of late notice. The "prejudice" issue as applicable to excess insurance carriers is one of first impression before the courts of the State of New

York. American Home was denied its discovery rights pursuant to Federal Rule of Civil Procedure 56(f), e.g., depositions, interrogatory responses, discovery and inspection responses, etc. and was compelled to accept the contents of the affidavits supplied by the defendants without any right of examination in order to question the veracity and credibility of the affiants.

The District Court granted summary judgment in favor of United and Republic, premising its decision upon two propositions. First, that the notices received from American Home were untimely as a matter of law and second, that United and Republic as excess insurance carriers need not prove that they were prejudiced by receipt of late notice, a decision contrary to established principles of New York Contract Law. American Home appealed, advancing clarification of New York's "no prejudice rule" citing the recent New York Court of Appeals decision that its "no prejudice rule" for primary

carriers is a limited exception to the ordinary rules of contract law.[1]

In its appeal American Home requested that the U.S. Court of Appeals certify the following question to the New York Court of Appeals: "whether an excess insurer must demonstrate prejudice when advancing a defense of late notice". The United States Court of Appeals for the Second Circuit affirmed the summary judgment on the basis that the New York Court of Appeals intended the "no prejudice rule" exception for primary insurers to encompass excess insurers as well, and ignored American Home's request to certify the question. The Court further

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[1]This ruling was handed down in the case of Unigard v. Security Insurance Co. v. North River Insurance Co., 79 N.Y.2d 576, 584 N.Y.S.2d 290, 292, 588 N.E.2d 91, 949, F.2d 630 (1992) wherein the U.S. Court of Appeals certified to the New York Court of Appeals the question of whether a reinsurer must demonstrate prejudice when advancing a defense of late notice. The New York Court of Appeals answered this question in the affirmative.

decided that the notices were untimely as a matter of law. American Home seeks review of that judgment.

REASONS FOR GRANTING THE PETITION

I. THE LOWER COURTS USURPED THE ROLE OF THE NEW YORK STATE COURTS BY CREATING SUBSTANTIVE LAW IN THE ABSENCE OF ANY STATE PRECEDENT ON THE QUESTION OF WHETHER AN EXCESS INSURER MUST DEMONSTRATE PREJUDICE WHEN ADVANCING A DEFENSE OF LATE NOTICE

A. THE JUDGMENT IS IN VIOLATION OF FEDERAL PRECEDENT

The question of whether an excess carrier must prove prejudice when advancing a defense of late notice is one of first impression before the courts of the State of New York. American Home requested that the circuit court certify this question to the New York State Court of Appeals. By ignoring this request and by unilaterally deciding the question in the absence of any New York

State precedent, the lower courts created substantive State law in violation of the holding of this Court in the case of Erie Railroad v. Tompkins, 304 U.S. 64 (1938).[2] In arriving at its decision, the circuit court looked to the decision by the New York Court of Appeals in Unigard (see footnote #1) on the certified question of whether a reinsurer must demonstrate prejudice when advancing a defense of late notice. The New York Court of Appeals responded in the affirmative and unequivocally held that the New York "no prejudice" rule is limited to primary insurers.

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[2]In Erie, this Court held: "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by it highest Court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable to a state whether they be local in their nature or "general", be they commercial law or part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

Hence, this case raises the significant issue of whether a federal court can either ignore the substantive law of the State in which it resides or whether such Court can issue a holding in the absence of any State precedent addressing that issue.

B. THE LOWER COURTS DECISION WILL HAVE PROFOUND EFFECT ON THE NEW YORK STATE INSURANCE INDUSTRY VIS-A-VIS INCREASED DISCLAIMERS OF COVERAGE BY EXCESS CARRIERS; INCREASED LITIGATION; INCREASED INSURANCE PREMIUMS AND, DECREASED BENEFITS TO CONSUMERS

It is common knowledge and accepted practice among the insurance industry that excess carriers, and more particularly second layer excess carriers, are almost never informed of the happening of the occurrence until a considerable period of time after the processing of the claim and subsequent lawsuit. In many instances, the excess carriers are first notified when the case is in suit

and discovery has been completed and in many instances on the eve of trial itself. Significantly, by allowing this decision to stand the floodgates are opened to unending procession of disclaimers of coverage by excess insurance carriers. Excess insurers will be unable to resist the temptation to disclaim coverage with impunity where notice was not given at the time of the happening of the occurrence. In many cases, the excess insurance coverage will have been placed by a broker and therefore, the insured is unaware of the identity of such carrier (as in the instant case). In practical application, once the insured places the primary carrier on notice he is completely unaware of the processing of the claim and lawsuit until such time as his presence is required at either depositions or trial. The lower courts' decision now places the onus upon the insured to notify the excess carrier immediately upon the happening of an occurrence even though an insured rarely is cognizant of the full

extent of injuries or damages claimed by the plaintiff or plaintiffs. Excess insurance carriers will now be encouraged to disclaim coverage as a matter of course and only render payment in the presence of a court order requiring same.

Hence, one of the repercussions of the lower courts' decision will be the burdening of an already overburdened court system in the form of declaratory judgment actions to determine the timeliness of notice of loss as to the first layer, second layer, third layer, etc. in the instant case, there were six excess layers of coverage.

One other significant effect of the lower courts' decision will be to unilaterally abrogate standard excess insurance contract language, thereby requiring notice immediately upon the happening of an occurrence thus driving up the cost of premiums for excess insurance. Standard excess policy language allows for notice of loss to be provided at a date later than the happening of the

occurrence where at first the claim did not appear likely to involve the excess insurer's policy. Such language is included as a protection device for the insured as well as to limit the cost factor for excess coverage by preventing unending claims which could be received by the excess policy but which in reality never expose the excess coverage.

Through the "culling" of claims and concerning itself only with those which may involve its policy, the excess carrier is able to reduce costs by not having to: employ large numbers of claims examiners; create excess coverage claims files; employ numerous support staff and retain counsel. As a result, the excess carrier is able to provide coverage at a reduced rate and thereby remain attractive and competitive in the excess insurance market. Such costs are diminished with each successive layer of coverage.

The decisions of the courts below mandate an insured to advise all layers of excess insurance on all claims regardless of merit, number of co-defendants and amount of damages prayed for in the summons and complaint. In the instant matter the damages did not exceed primary and first excess layers.

Naturally, the costs of implementing such changes will be passed on to the consumer in the form of substantially increased premiums. This will also have the divisive effect of pricing those insureds unable to afford the increased premiums out the excess insurance market. Therefore, there will be less insurance coverage available for injured parties. The next phase in this vicious cycle will be the fostering of expensive and time consuming litigation which will have a deleterious effect of on an already overburdened legal system. Thus, the real loser as a result of this decision is the consumer who will: face increased premiums; be unable to afford excess insurance

coverage; face costly and time consuming litigation; fall prey to insurance carriers who will take advantage of the slow and slower moving legal system to avoid coverage and have inadequate coverage available in the event of an accident.

C. THE LOWER COURTS' DECISION CONFLICTS WITH DECISION OF NEW YORK COURT OF APPEALS

Subsequent to the decision of the District Court, the New York Court of Appeals was asked this certified question: "must a reinsurer prove prejudice before it can successfully invoke the defense of late notice of loss by the reinsured?" See Unigard, supra at p. 292. Notably, the question was answered in the affirmative. Importantly, the question and case before the New York Court of Appeals concerned reinsurance and not excess insurance. In arriving at its conclusion, however, the New York Court of Appeals analyzed the differences between

a primary insurer (who performs investigation, retains counsel, etc.) and the role of a reinsurer. Concluding that the activities applicable to a primary insurer were inapplicable to a reinsurer, the court held that a reinsurer must demonstrate prejudice when advancing a defense based upon late notice. See Unigard, supra at p. 292. More importantly, the Court unequivocally stated that the New York "no prejudice" rule applicable to primary insurers is an exception to the general rules of contract law.[3] At its most conservative interpretation, the

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[3]Analyzing the certified question, the New York Court of Appeals in Unigard stated: "it is settled New York law that the notice provision for a primary insurer operates as a condition precedent and that the insurer need not show prejudice to rely on the defense of late notice. The question is whether the same rule should be applied in the context of reinsurance. The New York 'no prejudice' rule for primary insurers - as remarked by the District Court herein - is a limited exception to two established rules of contract law: (1) that ordinarily one seeking to escape the obligation to perform under a contract must demonstrate a material breach or prejudice and (2) that a contractual duty ordinarily will not be construed as a condition precedent absent clear language that the parties

Unigard decision did not address the issue of whether or not an excess insurance carrier must prove prejudice on a late notice defense. At its most liberal interpretation, Unigard stands for the proposition that the New York Court of Appeals only intended to carve out an exception to the ordinary rules of contract law for "primary carriers" and not excess insurers or reinsurers.

Arguing before the United States Court of Appeals for the Second Circuit, American Home likened an excess insurance carrier to that of a reinsurer, noting the almost identical roles played by each. Therefore, the circuit court was requested to apply the liberal interpretation of the Unigard decision. If however, the court chose to take a conservative route, American Home requested that the question of whether an excess insurer must demonstrate prejudice on a late notice defense be certified to the New

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intended to make it a condition." (Citations omitted.) Unigard, supra at page 292.

York Court of Appeals. Consequently, the Court of Appeals for the Second Circuit was obligated either to follow the precedent set forth in Unigard and thus reverse the District Court's entry of summary judgment or, request the New York Court of Appeals to arrive at a decision to this question for purposes of clarification. Completely ignoring the only two alternatives, the Court of Appeals for the Second Circuit arrived at its own conclusion which at the very least is contrary to the holding in Unigard.

In arriving at this conclusion, the Court embellished upon the New York Court of Appeals decision in Unigard, by deciding that when that court mentioned "primary insurers" it intended to encompass excess insurers as well. Absent from the circuit court's decision, is any caselaw, either state or federal, to support its conclusion. In fact, the court cites to the case of Hartford Accident and Indemnity Company v. Michigan Mutual

Insurance Company, 93 AD2d 337, 462 N.Y.S.2d 175 (1st Dept. 1983) which controverts the court's analysis that the term "primary insurer" includes excess insurers. In Hartford, supra, the Appellate Division, First Department of the Supreme Court of the State of New York interchangeably used the terms "primary carrier" and "primary insurer" which supports American Home's contention that the New York Court of Appeals in Unigard only intended the no prejudice exception to apply to a primary carrier, i.e. a primary insurer.[4] Indeed, the Hartford decision actually distinguishes between an

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[4]The New York Court in Hartford Accident and Indemnity Company v. Michigan Mutual Insurance Company, 93 A.D.2d 337, 462 N.Y.S.2d 175 (1st Dept. 1983) held : "...the primary carrier owes to the excess insurer the same fiduciary obligation which the primary insurer owes to its insured, namely a duty to proceed in good faith and in the exercise of honest discretion, the violation of which exposes the primary carrier to liability beyond its policy limits." (Citations omitted.) Id. at page 178.

"excess insurer" and a "primary insurer", i.e. "primary carrier".

There exist certain well established nomenclatures in the insurance industry to which insurance people and lawyers dealing with insurance litigation are familiar. The insurance industry uses the terms primary insurer and/or primary carrier, excess insurer and reinsurer on a daily basis and it is respectfully submitted that until the decision of the courts below in the instant matter, there has never been a question of the meaning and designation referable to the aforementioned classifications. The term "primary carrier" and/or "primary insurer" was understood and expected to be that insurance company that wrote the first level of coverage for the risk involved (this mandated investigation, defense and indemnity to the stated primary coverage). An "excess carrier" was by definition the carrier that accepted a monetary risk above the level of the primary insurer and/or the carrier to the extent of

their excess coverage. Second and third layer excess carriers were identical to first layer excess coverage with the difference being the point at which their policy became at risk. A reinsurance carrier was and still is understood to be a carrier which accepts that a portion of the amount of the coverage written by a primary carrier and/or an excess carrier by agreement with the respective carriers.

The court below in its criticism of appellant's counsel in order to affirm the District Court, maintained that the New York Court of Appeals used the word "primary insurer" to mean something completely different than the common accepted meaning.

A detailed analysis of the Unigard decision gives absolutely no insight as to the court's mental processes in its choice of verbiage. It is hornbook law that words are to be given their common and accepted meaning unless it is clearly stated to the contrary. The appellant's counsel

still unequivocally maintains that Judge Hancock, when writing on behalf of the unanimous court in Unigard used the term "primary insurer" and/or "primary carrier", it was used in its understood and commonly accepted meaning by the insurance industry and attorneys practicing insurance law. If the Court of Appeals wished the "no prejudice rule" to apply to all carriers that write directly with an insured, it would have so stated. Nevertheless, if there is an ambiguity, the resolution of same must be determined by the courts of the State of New York.

Furthermore, the federal courts have clearly distinguished between a primary and excess insurer as evidenced by the cases: Trustees of the University of Pennsylvania v. Lexington Insurance Company, 815 F.2d 890 (3rd Cir. 1987) and Insurance Company of the State of Pennsylvania v. Associated International Insurance Company, 922 F.2d 516 (9th Cir. 1991). See footnotes 5, 6, 7 and 8.

Hence, the Court of Appeals for the Second Circuit decided a question of New York State substantive law contrary to the applicable federal precedent.

D. THE JUDGMENT IS IN CONFLICT WITH DECISIONS OF THE SECOND CIRCUIT AND OTHER CIRCUITS

The United States Court of Appeals for the Second Circuit recognized and commented on the differences between a primary carrier and an excess carrier in Olin Corporation v. Insurance Company of North America, 929 F.2d 62, 743 F. Supp. 1044 (1991).[5] Olin, dealt with late

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[5]Distinguishing between the notice requirements for a primary and excess carrier, the court in Olin held: "Olin's obligation to notify its excess insurers is slightly different from its obligation to notify its primary carriers: in primary liability insurances the insurer uniformly undertakes to investigate and defend any claim covered by the policy. Consequently such policies regularly require that the assured give to the company immediate notice of any accident or claim involving the insurance. However, in excess liability insurances (as well as in most liability insurances written over a substantial deductible) the excess insurer does not undertake to defend the assured.

notice from the insured to its primary insurer and excess carriers. Ultimately, the United States District Court entered judgment in favor of the insurers after a full trial by jury which was subsequently affirmed on appeal. Significantly, the evidence revealed that the late notice prevented the primary carrier from timely performing those actions to protect the interests of the insured as well as itself. Hence, under the New York "no prejudice" rule for primary carriers, Olin's primary insurer was relieved of its contractual obligation without having to demonstrate prejudice. Despite the circuit court's analysis of the differences between a primary and excess insurers, the

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Consequently, the excess insurer is not interested in every accident, but only in those that may be serious enough to involve it. Excess policies, therefore, usually require an assured to give notice of claims 'that appear likely to involve the excess.' Therefore, Olin's duty to notify each excess insurer accrued when the circumstances known to Olin would have suggested a reasonable possibility of a claim that would trigger the excess insurer's coverage." (Citations omitted.) Olin supra at p. 1054

excess carriers were also relieved of their contractual obligations apparently on the basis that the excess carriers clearly were prejudiced, i.e. no investigation or defense of the claim by the primary carrier - items which the court used to distinguish between a primary and excess carrier. The court's holding in Olin however, conflicts with the decision in the instant case.

The lower court ruling also conflicts with decisions from the United States Court of Appeals for the Third and Ninth Circuits which hold that an excess insurer must prove prejudice when advancing a defense of late notice. In Trustees of the University of Pennsylvania v. Lexington Insurance Company, 815 F.2d 890 (3d Cir. 1987), the court required the excess carrier to demonstrate prejudice to prevail on its defense of late notice and upon its failure to demonstrate same, the court affirmed the existence of coverage. Importantly, in a step by step reasoned process,

the court analyzed first, the need for timely notice of loss[6], second, the "prejudice" issue as it relates to an excess carrier[7] and third, the potential prejudice which

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[6]Analyzing the "notice" requirement, the court in Trustees held: "Thus, a reasonable notice clause is designed to protect the insurance company from being placed in a substantially less favorable position than it would have been if timely notice had been provided, e.g., being forced to pay a claim against which it had not had an opportunity to defend effectively ... Where the insurance company's interests have not been harmed by a late notice ... the reason behind the notice condition in the policy is lacking, and it follows neither logic nor fairness to relieve the insurance company of its obligations under the policy in such situations." Trustees, supra at page 897, 898.

[7]Analyzing the prejudice issue as it relates to an excess carrier, the court in Trustees held: "Unlike primary insurers, excess insurers have no right to control a lawsuit and thus have less need for early notice. Moreover, because primary insurers will usually provide an experienced defense, the likelihood of prejudice from late notice is more remote." ... "But the purpose of the prejudice requirement is to allow an insurer to refuse payment only if its procedural handicap has lead to disadvantageous, substantive results - in other words, if the insured's violation of its contract has proximately caused its insurer damages. As a New Jersey Superior Court decision has cogently explained, courts have required not only of the loss of substantial defense

might have resulted by interference with the excess carrier's right to associate in the defense of the claim.[8] Such a process of analysis lead the circuit court to conclude that an excess insurance carrier must prove prejudice e.g., that it would have obtained a superior result had it received prompt notice. The U.S. Court of

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opportunities but also of a 'likelihood of success' in defending liability or damages if those opportunities had been available. Indeed, such a requirement makes particular sense in cases involving excess coverage because excess carriers generally have no right to control a lawsuit and because notice to the primary carrier generally ensures a competent and intelligent defense.'" Trustees, supra at pages 898, 899.

[8]As to the claim that the carrier was prejudiced due to interference with its right to associate in the defense of the claim, the court in Trustees held: "The mere interference with Lexington's right to 'associate' in the defense of the claim is too amorphous and cannot itself constitute prejudice unless Lexington can demonstrate that earlier notice would probably have lead to a more advantageous result." Trustees, supra at page 899.

Appeals for the Third Circuit has similarly adopted this reasoning.[9]

In reviewing the lower courts' decision, this Court will have an opportunity to remedy the conflicts which have been created between this decision and the decisions of the New York State Court of Appeals; a decision from this Circuit; and decisions from other circuits. Thus on these points, the writ of certiorari should be granted and the judgment of the lower court should be reversed.

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[9]In the case Insurance Company of the State of Pennsylvania v. Associated International Insurance Company, 922 F.2d 516 (9th Cir., 1991), the court reiterated the analysis of the U.S. Court of Appeals for the Third Circuit in Lexington, supra. See Insurance Company of the State of Pennsylvania at page 523.

2. WHETHER SUMMARY JUDGMENT MAY BE ENTERED IN FAVOR OF A PARTY ALLEGING A NOTICE OF LOSS WHERE MITIGATING FACTORS ARE PRESENT

The lower court disposed of the issue of timeliness of the American Home notices despite the presence of mitigating factors. Pursuant to well settled law of the State of New York, where an excuse or explanation is offered for delay in furnishing notice, the reasonableness of the delay and the sufficiency of the excuse are matters to be determined at trial.[10]

American Home placed United and Republic on notice of the underlying claims at the time in which it

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[10]See Mighty Midgets, Inc. v. Centennial Insurance Company, 47 N.Y.2d 12, 416 N.Y.S.2d 559, 389 N.E.2d 1080 (1979); Hartford Accident and Indemnity Company v. CNA Insurance Company, 99 A.D.2d 310, 472 N.Y.S.2d 342 (1st Dept. 1984); Heydt Contracting Corporation v. American Home Assurance Company, 146 A.D.2d 497, 536 N.Y.S.2d 770 (1st Dept. 1989); Olin Corporation v. Insurance Company of North America, 743 F. Supp. 1044, 929 F.2d 62 (2d Cir. 1991).

learned that they were likely to involve the respective policies.[11] Notice was provided by American Home in accordance with the requirements of United and Republic's policies.[12] Despite the American Home

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[11]American Home learned of plaintiff's demand to settle the underlying claims in the amount of $12.5 million, on October 23, 1986. On October 28, 1986, American Home placed United and Republic on notice of the claims since they appeared likely to involve their policies.

[12]Republic's policy exchanged with American Home states at Condition No. 3: "NOTICE OF OCCURRENCE - Whenever the insured has information from which they may reasonably conclude that an occurrence hereunder involves injuries or damage which in the event that the insured shall be held liable, is likely to involve this Policy, notice shall be given by or on behalf of the insured to Cravens, Dargan & Company and/or Southwest Adjustment and Survey, P.O. Box 1660, Houston, Texas 77251, as soon as practicable; provided however, that failure to give notice of any occurrence which at the time of its happening did not appear to involve this policy, but which at a later date, would appear to give rise to claims hereunder, shall not prejudice such claims." (emphasis added).

United's policy exchanged during pre-trial discovery with American Home states at Part IV, Condition 5: "Whenever the insured has information from which the

notices, the lower court chose to focus upon two pieces of correspondence received from counsel for the mutual insured, dated August 29, 1986 and September 22, 1986.[13] The August 29, 1986 letter merely rendered counsel's opinion as to potential liability without specifying dollar amounts and, the September 22, 1986

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insured may reasonably conclude that an occurrence covered hereunder involves injuries or damages which in the event that the insured should be liable, are likely to involve this policy, notice shall be sent to the Company as soon as practicable; provided, however, that failing to give notice of any occurrence which at the time of its happening did not appear to involve this policy but which at a later date would appear to give rise to claims hereunder, shall not prejudice such claims." (emphasis added).

American Home re-noticed United and Republic on December 22, 1986 and again on January 7, 1987. Despite having received such notices, neither carrier responded.

[13]Inge Twitty Duffy & Prince, were primary carrier's counsel, writing to first layer excess carrier. The court below denied appellant's ability to inquire whether Inge Twitty Duffy & Prince also corresponded with second layer excess carriers.

letter provided an opinion as to settlement and verdict range as against Mobile Gas and all co-defendants.

The U.S. Court of Appeals for the Second Circuit not only misconstrued the significance of these letters, finding that there existed a minimum 36-day delay between the September 22, 1986 letter and the October 28, 1986 American Home notice but also chose to disregard their contents which clearly stated opinions as to the extent of the co-defendant's liabilities. The letters, if taken in their entirety lead to the conclusion that there would be no exposure above the primary and first level of excess coverage.

In support of its limited interpretation of the August 29th and September 22nd letters, the U.S. Court of Appeals cites to numerous cases wherein it is alleged "similar inexcusable delays in providing notice discharged an insurers obligation to provide coverage." American Home Assurance Company v. Republic Insurance

Company, 984 F.2d 76, 78. Importantly, all of the cases cited by the Court involved primary carriers, none involved excess insurance carriers.[14] Also of importance is the fact that the decisions on timeliness of the notices in the majority of these cases were determined by a jury, thus supporting American Home's contention that the factual issues present in the instant case should have been presented to a jury for their determination after full disclosure pursuant to the Federal Rules of Civil

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[14]See Rushing v. Commercial Casualty Insurance Company, 251 N.Y. 302, 304 167 N.E. 450 (1929); Haas Tobacco Company v. American Fidelity Company, 226 N.Y. 343, 345 123 N.E. 755 (1919); Quinlan v. Providence Washington Insurance Company, 133 N.Y. 356, 362, 31 N.E. 31 (1892); Power Authority of New York v. Westinghouse Electric Corp., 117 A.D.2d 336, 342-43, 502 N.Y.S.2d 420 (1986); Government Employees Insurance Company v. Elman, 40 A.D.2d 994, 338 N.Y.S.2d 666 (1972); Vanderbilt v. Indemnity Insurance Company, 265 A.D. 495, 496, 39 N.Y.S.2d 808 (1943); Reina v. United States Casualty Company, 228 A.D. 108, 239 N.Y.S. 196 (1930), aff'd, 256 N.Y. 537, 177 N.E. 130 (1931); Gullo v. Commercial Casualty Insurance Company, 226 A.D. 429, 434, 235 N.Y.S. 584 (1929).

Procedure. Consequently, the lower court judgment should be reversed.

3. THE LOWER COURT'S DECISION MAY CONFLICT WITH DECISIONS ON CASES PENDING IN SUPREME COURT OF THE STATE OF NEW YORK INVOLVING THE PRECISE ISSUES IN THE CASE AT BAR

Presently, two cases remain pending before the Supreme Court of the State of New York arising from the incident which gave rise to the instant litigation.[15]

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[15]The cases of American Home Assurance Company v. National Casualty Company, Supreme Court, New York County and, American Home Assurance Company v. International Insurance Company, Supreme Court, New York County are presently at their conclusion of pretrial discovery. International Insurance Company and National Casualty Company were co-second layer excess carriers along with United and Republic. The trial of these cases will involve the issues of "timeliness" of the notice and, whether or not an excess insurer must demonstrate prejudice when advancing a defense of late notice. United, Republic, International Insurance Company and National Casualty Company were all placed on notice at the same time. In the case of American Home Assurance Company v. National Casualty Company, a motion for summary judgment is presently pending.

Consequently, a decision will be rendered for the first time by the Supreme Court of the State of New York on the issue of whether or not an excess carrier must demonstrate prejudice on a late notice defense. Additionally, the factual question of "timeliness" of the American Home notices will be decided by a jury. Of necessity, the Appellate Division of the State of New York and/or the Court of Appeals of New York will be required to render a decision on the issue of whether or not the "no prejudice" rule applies to excess carriers and will in essence set forth the substantive law on this issue for the State of New York.

In the event that the courts of the State of New York agree with the position set forth by the appellant, it will be in conflict with the substantive law composed by the federal courts and will result in an unjust enrichment by the appellees.

This Court is afforded the opportunity to review the lower courts' decision and either reverse the lower court judgment with the direction that the lower court certify the "prejudice" question to the New York Court of Appeals and allow a jury to determine the "timeliness" issue or in the alternative, stay a final determination on this matter until the cases pending in the Supreme Court of the State of New York have had opportunity to be heard by the New York Court of Appeals.

4. THE-BASIS FOR JURISDICTION AND CHOICE OF LAW WERE INTERTWINED AND MUTUALLY EXCLUSIVE

In order for the lower court to grant summary judgment it had to establish two elements. The first element was jurisdiction and the second element was the existence of a significant number of contacts sufficient to justify the application of the substantive law of the State of New York. In order to satisfy the first element

(jurisdiction) the lower court made a finding of fact that there was diversity of citizenship between plaintiff and defendants. In order to satisfy the second element (significant contacts) the court made a finding that the "parties' principle place of business is here [New York]". These findings are mutually inconsistent.

If the parties' principle place of business is in New York then they are citizens of that State as per federal statute which therefore removes the district court's jurisdiction. If the finding that the "parties' principle place of business is here" was erroneous and the only party that has a principle place of business in New York is American Home (equitable subrogee), then there can be no legal basis for the application of the law of the State of New York. United's policy was issued out of Pennsylvania; Republic's policy was issued out of Texas; the tort was committed in the State of Alabama; the risk was insured in Alabama and the potential damages were

ascertained by virtue of the substantive law of the State of Alabama.

The circuit court did not attempt to resolve the legal principles created by the lower court's inconsistent statement but chose rather to denigrate counsel for the appellant by labelling the argument as "specious". It further based its conclusion as to same being "specious" by its statement that "American Home states that it is a New York corporation alone and appellees are not". This latter statement by the circuit court has no probative value whatsoever.

We respectfully submit that American Home has never claimed that appellees are New York corporations but rather referred the circuit court to the statute (28 U.S.C. §1332) which deems a corporation to be a citizen of the state where its principle place of business is located as per Judge Lasker's footnote #1. Instead of addressing the dichotomy created by the district court's footnote,

appellant's counsel is denigrated for raising the issue. The circuit court attempts to overlook the district court's findings of fact by resorting to grammatical semantics e.g. "juxtaposition".

The issue of jurisdiction created by Judge Lasker's footnote was never resolved on its merits. Furthermore, the issue of jurisdiction is intertwined with the choice of substantive law to be applied to the facts in dispute. The circuit court after its categorization of appellant's arguments as being "specious" ignored the significance of district courts' conclusion that appellees were not citizens of New York for diversity but were citizens of New York by virtue of having their principal place of business in New York for purposes of choice of law. The circuit court rather than resolve these legal inconsistencies deigned to ignore the legal choice of law principles by stating that "American Home's remaining arguments are not of sufficient substance or precedential value to even merit discussion." That decision by the court ignores New

York State's longstanding rules regarding the application of its choice of law principles and thereby violates this court's holding in Erie.

Despite New York choice of law rules, the lower court applied the substantive law of the State of New York instead of the law of the State of Alabama, Pennsylvania and/or Texas.[16] The application of New York law was premised upon the lower court's finding that the controlling contracts were made in New York and because the parties' principal place of business was in

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[16]See Neumeier v. Kuehner, 31 N.Y.2d 121, 335 N.Y.S.2d 64, 286 N.E.2d 454 (1972); Auten v. Auten, 308 N.Y. 155, 160, 124 N.E.2d 99 (1954); Fleet Messenger Service, Inc., v. Life Insurance Company of North America, 315 F.2d 593, 596 (2d Cir. 1963). In Calla v. Shulsky, 148 A.D.2d 60, 543 N.Y.S.2d 666, 670 (1st Dept., 1989), the Court held: "First, New York law is only applicable because a common domicile is shared by the parties. In the absence of a common domicile, the law of the situs of the injury will be applied. Furthermore, to apply New York law to a given transaction, it must have "a sufficient contact with this forum to preclude application of the lex loci delicti commissi in favor of the lex loci contractus". Id. at p.670

New York.[17] No evidence was presented indicating where the contracts were made; only where the contracts issued from. Assuming that the district court meant that American Home alone maintained its principal place of business in New York (despite the obvious meaning of the verbiage used) New York choice of law principles required at the minimum, the application of Alabama law since the insured (Mobile Gas) is an Alabama citizen; the respective policies (as they relate to the insured claimant) covered risks arising only in the State of Alabama and the tort was committed in the State of Alabama. Moreover, United and Republic concede that significant contacts are lacking with the State of New York as indicated by their opposition papers which state that a "tenuous" connection

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[17]The decision of the District Court stated: "It is undisputed that New York law controls because the controlling contracts were made here and because the parties' principal place of business is here." American, supra at page 215.

existed between the instant matter and the State of New York.[18] Additionally, the Second Circuit recently analyzed New York choice of law principles in the case of Olin, which, if applied to the instant matter would also require the application of Alabama law.[19] Therefore, the lower courts improperly applied the law of the State of New York in the absence of significant contacts with it

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[18]Affidavit of Andrew J. Entwistle in opposition, before U.S. Court of Appeals for the Second Circuit stated: "The only, albeit tenuous connection to New York in this regard, is that New York was the place of delivery to the extent Stone and Webster [primary insured] received the policy...."

[19]Analyzing New York choice of law principles, the court in Olin held: "New York law requires courts to apply the law of the jurisdiction 'which has the most significant contacts with the matter in dispute.' In cases involving insurance contracts, New York courts have looked principally to the following factors: the location of the insured risk; the insured's principal place of business; where the policy was issued and delivered; the location of the broker or agent placing the policy; where the premiums were paid; and the insurer's place of business." Olin, supra at page 1048, 1049

or for that matter, in the absence of any significant interest in having New York's law applied.

If the circuit court's position on choice of laws is to be followed it would require that all lawsuits brought under the policies wherein American Home is a party be adjudicated based upon the substantive law of the State of New York. This doctrine would be followed even though the named insureds under the policies involved in the instant actions have their places of business in approximately 25 different states; the risks are covered in approximately 25 different states and the torts would be committed in approximately 25 different states. Hence, assuming American Home (a New York corporation), had brought this action in the federal courts of the State of Alabama, New York substantive law would have to apply. The same is equally applicable for actions brought in Pennsylvania, Texas, etc. On this basis, the lower court decision should be reversed.

A. THE LOWER COURT SHOULD HAVE APPLIED NEW YORK STATE INSURANCE LAW SECTION 3420(d) OR IN THE ALTERNATIVE, THE APPLICABLE COMMON LAW. BY FAILING TO DO SO, THE LOWER COURT DECISION IS IN CONFLICT WITH DECISIONS FROM THIS CIRCUIT AND NEW YORK CASELAW

Inextricably intertwined with the choice of law issue, is the application of New York State Insurance Law Section 3420(d) or in the alternative, the common law.[20] Having determined the applicability of New York State's substantive law, it was incumbent upon the lower court to apply either Insurance Law 3420(d) or the state's common law. The Court is without authority to pick and choose

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[20]New York State Insurance Law subsection 3420(d) states: "If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant." (McKinney's, 1984).

portions of a state's law to apply simply because it may or may not be beneficial to the Court's argument and ignore the substantive law which would require reversal.

In finding Insurance Law 3420(d) inapplicable, the lower court created a paradox, i.e., having determined that said law is only applicable where the claim bears a substantial relation to New York.[21] The dichotomy presented by the lower court's opinion can be restated as such: either significant contacts with the State of New York warrant the application of New York substantive

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[21]The lower court held: "We agree with the district court's holding that appellees' failure to promptly disclaim coverage did not constitute a waiver of their defense pursuant to Section 3420(d) of New York's Insurance Law. 788 F.Supp. at 218. In Ogden Corp. v. Travelers Indemnity Company, 739 F. Supp. 796 (S.D.N.Y. 1989), aff'd 924 F.2d 39 (2nd Cir. 1991), the district court, citing New York authority, held that Section 3420(d) did not apply to out-of-state accidents, at least where they did not bear a substantial relation to New York. Id. at 803. In view of our affirmance in that case, and in the absence of any subsequent New York authority to the contrary, the court below correctly held Section 3420(d) inapplicable herein." American Home, supra at page 79.

law thus requiring the application of Section 3420(d) or, the absence of significant contacts require the application of the substantive law of the State of Alabama.

The circuit court ignored the case of Marino v. New York Telephone Company, 944 F.2d 109 (2d Cir., 1991) and supported its view by referring to Ogden Corp. v. Travelers Indemnity Co., 739 F.Supp. 796 (S.D.N.Y. 1989), Aff'd 924 F.2d 39 (2d Cir. 1991), which the circuit court had affirmed. The Court however, failed to recognize the fact that Ogden involved a claim for property damage and that 3420(d) of the insurance law is applicable only to claims for bodily injury.[22] In that

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[22]Ogden, concerned a claim of property damage occurring outside the State of New York and was therefore inapplicable in all respects. In Marino however, the court held: "While some courts have applied Section 3420(d) to accidents occurring outside New York when the policy was issued in New York and there existed very strong connections to New York, that particular issue has not been addressed by the New York Court of Appeals. Section 3420(d) is clearly limited in application to policies delivered or issued for delivery in New York."

Ogden involved property damage, it was not within the purview of the statute and cannot be considered a precedent for a claim involving bodily injury. Moreover, the circuit court's view that New York law was clear on the issue of the applicability of 3420(d) to bodily injury claims occurring outside the State of New York is erroneous as the same court in Marino decided subsequent to Ogden, stated clearly that this issue was unsettled in the State of New York.

The circuit court further states that there is an absence of any subsequent New York authority to the contrary. Necessarily, such finding ignores the subsequent decision of that very court wherein Judge Meskill in Marino cites New York authority to the contrary.

If the lower court chose not to apply Section 3420(d), then it was obliged to honor American Home's request to

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Marino, supra at page 114.

certify the question of whether or not the insurance law is applicable to policies issued or delivered in New York where the accident arose outside the State of New York. The lower court however, chose to ignore American Home's request for certification.

Finding Insurance Law 3420(d) inapplicable by reason of its lack of substantial contacts with New York (Ogden, supra at pages 803-804), the court nevertheless found contacts substantial enough to apply New York substantive law. Thus, the court has created an unresolvable dilemma, to wit: the contacts with New York are not sufficiently substantial to warrant the application 3420(d), yet those very same contacts are utilized by the court to support its application of New York law to all other aspects of this case. This inconsistency was neither explained nor justified in the circuit court's decision. Stated another way, if there is not a substantial relationship with New York sufficient to

apply 3420(d) how can there be substantial relationship for New York to apply its substantive law on the issue of notice?

Though the district court failed to address New York's common law governing delayed disclaimer, the circuit court nevertheless addressed this issue and decided as a matter of law that there was no prejudice.[23] This deprived American Home of its constitutional right to a trial by jury on this factual issue.

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[23]In Grening v. Empire Mutual Insurance Company, 101 A.D.2d 550, 553, 475 N.Y.S.2d 423 (1st Dept. 1984), the Appellate Division of the New York Supreme Court held: "Moreover, Insurance Law subsection 167(8) [predecessor to 3420(d)] is only a procedural statute, fixing the time within which a disclaimer must be made respecting 'accident[s] occurring within the state." If not applicable to an out-of-state accident [subsection 167(8)/subsection 3420(d)], the common law rule is applicable requiring a showing of prejudice to estop the effect of a belated disclaimer." Id. at page 553. See also: Allstate Insurance Company v. Gross, 27 N.Y.2d 63, 317 N.Y.S.2d 309, 319 (1970); Ashland Window and House Cleaning Company, Inc. v. Metropolitan Casualty Company of New York, 269 A.D.2d 31, 53 N.Y.S.2d 677.

Pursuant to the common law, American Home demonstrated prejudice as it paid $620,000 on behalf of each of the appellees without remuneration to the present date. The lower court dismissed this argument with the factually unsubstantiated and legally unsupported holding that American Home had agreed in substance to the settlement prior to placing United and Republic on notice, thereby negating any prejudicial delay on their part. The concept of an agreement in substance referable to tort litigation is novel and unique. The substantive law of the State of New York does not recognize an agreement in substance as being binding. Therefore, the circuit court's decision on this issue runs contrary to the law of the State of New York which holds that a settlement is binding only when made between counsel in open court or when it is in writing subscribed by the settling party or his attorney. See McKinney's Cons. Laws of New York, CPLR, Book 7B.

If the lower court had allowed the appellant to conduct proper discovery proceedings then there would be no question as to when, where and how appellees had notice of the negotiations. Hence, had United and Republic timely disclaimed coverage, no settlement would have taken place and no payments would have been made by American Home on the second excess layer. At the very least, the issue of disclaimer both pursuant to statute and common law presented questions of fact which should have been decided by a jury. Therefore, the judgment of the lower court should be reversed.

CONCLUSION

This case presents an opportunity for this Court to remedy a usurpation by the federal courts of the role of the New York State courts to decide matters of substantive law; to cure the lower courts' complete disregard of the principles applicable to conflict of law

both statewide and under federal jurisprudence; to prevent a substantial damage which will be done to the New York State insurance system as well as all of the consequences which will flow therefrom; and, to avoid conflicting decisions between the federal courts and the New York State court system on issues of New York substantive law. For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

We apologize if the contents of this petition appears to be critical of the language contained in the circuit court's decision. The courts have always been critical of ad hominem remarks made by opposing counsel. Nevertheless, the circuit court characterized appellant's counsels position in a most demeaning manner by using descriptive language of the merits of the brief: "specious assertion", "equally little to recommend it" and "American Home's remaining arguments are not of sufficient substance or precedential value to even merit discussion".

As members of the bar we are obligated to represent our clients to the fullest degree. We respect each and every member of the judiciary that makes up the federal court system. Mutual respect constitutes the highest form of professionalism amongst members of the bar.

Respectfully submitted,

By:_____
Seymour H. Metnick
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Attorneys for American Home
Assurance Company

April, 1993

APPENDICES

APPENDIX A

AMERICAN HOME ASSURANCE COMPANY, Plaintiff-Appellant,

v.

REPUBLIC INSURANCE COMPANY and United National Insurance Company, Defendants-Appellees.

No. 207, Docket 92-7424

United States Court of Appeals,
Second Circuit.

Argued Oct. 5, 1992.
Decided Jan. 22, 1993

First level excess insurer sought contribution from second level excess insurers for settlement, made without second level excess insurers' approval. The United States District Court for the Southern District of New York, Morris E. Lasker, J., 788 F.Supp. 214 dismissed complaint, and appeal was taken. The Court of Appeals, Van Graafeiland, Circuit Judge, held that, under New York law, first level excess insurer was not entitled to contribution

where first level excess insurer agreed to substantive terms of its settlement with claimants before second level excess insurers received first level insurer's notice of loss.

Affirmed.

1. Insurance 390

Failure to disclaim coverage promptly is not waiver of that defense. N.Y. McKinney's Insurance Law § 3420(d).

2. Insurance 390

Under New York law, only if prejudice as result of unreasonable delay is shown by adequate proof is insurer estopped from asserting noncoverage.

3. Insurance 604(1)

Under New York law, first level excess insurer was not entitled to contribution from second level excess insurers for settlement which exhausted first level excess coverage and invaded second level excess coverage where first level excess insurer agreed to substantive terms of its settlement with claimants before second level excess

insurers received first level insurer's notice of loss.

Seymour H. Metnick, New York City (Scott H. Seskin, Metnick & Schuchman, of counsel), for plaintiff-appellant.

Andrew J. Entwistle, New York City (Anna B. Cline, Moore Wohl & Newman, of counsel), for defendants-appellees.

Before: VAN GRAAFEILAND, PRATT and ALTIMARI, Circuit Judges.

VAN GRAAFEILAND, Circuit Judge:

American Home Assurance Company appeals from a summary judgment of the United States District Court for the Southern District of New York (Lasker, J.) dismissing its action for contribution against Republic Insurance Company and United National Insurance Company ("appellees"). American Home, a first level excess insurer, is seeking to require appellees, second level excess insurers,

to contribute to a settlement, made by American Home without appellees' approval, which exhausted first level excess coverage and invaded second level excess coverage. The district court rejected American Home's claim because appellees had not been given timely notice of loss. We affirm. Because Judge Lasker's comprehensive and well-reasoned opinion is reported, 788 F.Supp. 214, (S.D.N.Y. 1992), we need add little to what already has been said. We write briefly in response to certain arguments made by American Home on appeal.

At the outset, we may dispose quickly of American Home's specious assertion of lack of diversity, which is based upon the district court's juxtaposition of language in footnote 1 of its opinion, *id.* at 215, where it said "the parties' principal place of business is here." The fact of the matter, as alleged in American Home's complaint, is that American Home alone is a New York corporation; appellees are not.

American Home's misconstruction of the New York Court of Appeals' opinion in *Unigard Security Ins. Co. v. North River Ins. Co.*, 79 N.Y.2d 576, 584 N.Y.S.2d 290, 594 N.E.2d 571 (1992), has equally little to recommend it. When that case was before this court, 949 F.2d 630 (1991), we requested the New York Court of Appeals by certification to advise us whether, under New York law, a reinsurer must prove prejudice before it can invoke successfully the defense of late notice of loss. *Id.* at 632. In holding that proof of prejudice was required, the New York Court of Appeals distinguished between reinsurers, which in essence insure other insurance companies, and insurers providing protection for ultimate insureds, which the court aptly described as "primary" insurers. 79 N.Y.2d at 582-83, 584 N.Y.S.2d 290, 594 N.E.2d 571.

The word "primary" is used also in the field of excess insurance to distinguish coverage which attaches immediately upon the happening of an occurrence, from

excess coverage, which attaches only after a pre-determined amount of "primary" coverage has been exhausted. *See Hartford Accident & Indem. Co. v. Michigan Mutual Ins. Co.*, 93 A.D.2d 337, 338-39, 462 N.Y.S.2d 175 (1983), *aff'd* 61 N.Y.2d 569, 475 N.Y.S.2d 267, 463 N.E.2d 608 (1984); *Union Indem. Ins. Co. v. Certain Underwriters at Lloyd's,* 614 F.Supp. 1015, 1017 (S.D.Tex.1985); B. Ostrager & T. Newman, *Handbook on Insurance Coverage Disputes* § 6.03[a] (5th ed.). Seizing upon this usage of the word "primary", American Home contends that appellees are "excess" insurers, not "primary" ones, and therefore they are required to show prejudice.

In making this argument, American Home overlooks the well-established rule of construction to the effect that words can take on different meanings in different contexts. "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances

and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425, 38 S.Ct. 158, 159, 62 L.Ed. 372 (1918); *see In re Fidelity Mortgage Investors*, 690 F.2d 35, 38 (2d Cir. 1982), *cert. denied*, 462 U.S. 1106, 103 S.Ct. 2453, 77 L.Ed.2d 1333 (1983). Thus, the word "primary" may be used in one context to distinguish coverage, that attaches immediately upon the happening of an occurrence, from "excess" coverage, while in another context it may be used to distinguish coverage, written directly for the insured, form coverage that indemnifies the direct or "primary" insurer. It is in the latter context that the New York Court of Appeals used the word "primary" in *Unigard*.

In holding that the notice of loss in the instant case was not timely, the district court stated that Mobile must have realized within a few days after the acident in which five people were killed that there was a serious likelihood that a recovery would exceed the $5,300,000 of primary coverage. 788 F.Supp. at 218. American Home contends

that this statement did not lay a proper foundation for a grant of summary judgment since a "material factual question[]" existed as to whether a reasonable jury would so find. Assuming for the sake of argument that this contention has merit, it overlooks the district court's additional uncontroverted findings that on August 29, 1986 and again on September 22, 1986 American Home had been notified by counsel of the probability of a "huge recovery by plaintiffs." *Id.* at 217. By American Home's own admission, its earliest notice to appellees was not sent until October 28, a delay of at least thirty-six days. Putting aside the question whether the notice was adequate, it clearly was untimely. New York courts have held as a matter of law on numerous occasions that similar inexcusable delays in providing notice discharged an insurer's obligation to provide coverage. *See Rushing v. Commercial Casualty Ins. Co.*, 251 N.Y. 302, 304, 167

Fidelity Co., 226 N.Y. 343, 345, 123 N.E. 755 (1919) (10 days); *Quinlan v. Providence Washington Ins. Co.*, 133 N.Y. 356, 362, 31 N.E. 31 (1892) (33 days); *Power Authority of New York v. Westinghouse Elec. Corp.*, 117 A.D.2d 336, 342-43, 502 N.Y.S.2d 420 (1986) (53 days); *Government Employees Ins. Co. v. Elman*, 40 A.D.2d 994, 338 N.Y.S.2d 666 (1972) (mem.) (29 days); *Vanderbilt v. Indemnity Ins. Co.* 265 A.D. 495, 496, 39 N.Y.S.2d 808 (1943) (28 days); *Reina v. United States Casualty Co.*, 228 A.D. 108, 239 N.Y.S. 196 (1930) (26 days) *aff'd*, 256 N.Y. 537, 177 N.E. 130 (1931); *Gullo v. Commercial Casualty Ins. Co.*, 226 A.D. 429, 434, 235 N.Y.S. 584 (1929) (13 days). Particularly relevant to the issue of improper delay is the undisputed fact that, during the period between September 22 and October 28, American Home was conducting settlement negotiations bearing directly on appellees' interests.

We are not persuaded by American Home's

argument that it should have been allowed additional discovery. Notice of loss under appellees' policies was required to be given "by or on behalf" of the insured. Information coming to appellees from any other source would not satisfy the policy requirements. *Heydt Contracting Corp. v. American Home Assurance Co.*, 146 A.D.2d 497, 499, 536 N.Y.S.2d 770 (mem.), *appeal dismissed*, 74 N.Y.2d 651, 542 N.Y.S.2d 520, 540 N.E.2d 715 (1989); *see also Insurance Co. of North Am. v. Waldroup*, 462 F.Supp. 161, 162 (M.D.Ga. 1978). No one knows better than American Home and its insured whether any notices additional to those already before the court were given. There was no error in the district court's denial of American Home's "fishing expedition" contention that it "was entitled to review all documents created from December, 1985 to 1990, regardless of whether or not United National and Republic come to a legal conclusion as to what is and what is not responsive." Appellant's Reply

Brief at 19.

[1] We agree with the district court's holding that appellees' failure to promptly disclaim coverage did not constitute a waiver of their defense pursuant to section 3420(d) of New York's Insurance Law. 788 F.Supp. at 218. In *Ogden Corp. v. Travelers Indem. Co.*, 739 F.Supp. 796 (S.D.N.Y. 1989), *aff'd*, 924 F.2d 39 (2d Cir. 1991), the district court, citing New York authority, held that section 3420(d) did not apply to out-of-state accidents, at least where they did not bear a substantial relation to New York. *Id.* at 803. In view of our affirmance in that case, and in the absence of any subsequent New York authority to the contrary, the court below correctly held section 3420(d) inapplicable herein.

[2,3] Because the district court did not discuss the common law rule governing delayed disclaimer, we note that under the New York common law rule, "only where prejudice as a result of the unreasonable delay is shown by

adequate proof is the insurer estopped from asserting noncoverage." *Western World Ins. Co. v. Jean & Benny's Restaurant, Inc.*, 69 A.D.2d 260, 263, 419 N.Y.S.2d 163, *appeal dismissed*, 48 N.Y.2d 653, 421 N.Y.S.2d 202, 396 N.E.2d 485 (1979); *see also Grening v. Empire Mutual Ins. Co.*, 101 A.D.2d 550, 553, 475 N.Y.S.2d 423 (1984). Here, American Home had agreed, in substance at least, to the terms of its settlement with the claimants before appellees even received American Home's notice of loss. Appellees' subsequent refusal to contribute to the consummated settlement did not constitute prejudicial delay which estopped it from denying coverage.

Because American Home's remaining arguments are not of sufficient substance or precedential value to even merit discussion, we affirm. In so doing, we are not unmindful of the apparent inequity of permitting excess carriers such as appellees to avoid contribution on the ground of late notice of loss without a showing of some

prejudice of substance resulting from the delay. However, even if the decisive factor of late notice were not in the instant case, the probability of recovery by American Home would be questionable at best. Volunteer settlements do not always produce equitable results. *See Associated Mutual Ins. Co. v. Firemen's Fund Ins. Co.*, 81 A.D.2d 949, 950, 439 N.Y.S.2d 706 (1981) (mem.), *aff'd*, 56 N.Y.2d 676, 451 N.Y.S.2d 731, 436 N.E.2d 1333 (1982); *Government Employees Ins. Co. v. Travelers Ins. Co.*, 63 A.D.2d 957, 958, 405 N.Y.S.2d 492 (1978) (mem.); *Trojcak v. Wrynn*, 45 A.D.2d 770, 357 N.Y.S.2d 32 (1974) (mem.); *Rome Cable Corp. v. Tanney*, 21 A.D.2d 342, 344-45, 250 N.Y.S.2d 304 (1964).

Affirmed.

APPENDIX B

AMERICAN HOME ASSURANCE COMPANY,
Plaintiff,

v.

REPUBLIC INSURANCE COMPANY and United National Insurance Company, Defendants.

No. 90 Civ. 4095(MEL).

United States District Court,
S.D. New York.

April 3, 1992.

Excess liability insurer which had participated in settlement of claim sued other excess insurers, to obtain reimbursement for share of risk under excess insurance arrangement. The District Court, Lasker, J., held that defending excess insurers had not been given timely notice of occurrence of claim that might result in liability under their policies.

Complaint dismissed.

1. Insurance 539.8

Under New York law direct insurers need not demonstrate prejudice to assert defense of untimely notice.

2. Insurance 675.5

Second level excess liability insurers which had contract directly with insureds were "direct insurers" under New York law entitled to notice of claim, rather than reinsurers not entitled to such notice.

See publication Words and Phrases for other judicial constructions and definitions.

3. Insurance 539.3

Second level excess liability insurers, whose obligation began at $5 million threshold, were entitled to notice of occurrence that might give rise to a claim "as soon as practicable" following death of five persons from carbon monoxide poisoning traceable to defective furnace installed by insured, even though no written estimate of damage

indicating award in excess of $5 million was prepared until nine months after incident; circumstances gave immediate indication that $5 million threshold would be exceeded.

4. Insurance 540

Second level excess liability insurers were not given notice "as soon as practicable" after attorney wrote letter to insured indicating that insured was facing liability exposure of $10 to $15 million in connection with death by carbon monoxide poisoning of five persons directly traceable to defective house furnace installed by insured; excess insurers did not receive notice until over one month after attorney's letter was received.

See publication Words and Phrases for other judicial constructions and definitions.

5. Insurance 390

Under New York law prompt disclaimer of coverage was not required in connection with loss incurred outside of state. N.Y.McKinney's Insurance Law § 3420(d).

Metnick & Schuchman, P.C., (Scott H. Seskin, of counsel), New York City, for plaintiff.

Moore, Wohl & Newman, P.C. (Andre J. Entwistle, of counsel), New York City, for defendants.

LASKER, District Judge.

In this coverage dispute among insurers,[1] defendants Republic Insurance Company and United National Insurance Company move for summary judgment against plaintiff American Home Assurance Company for failure of either the insured or American Home to provide defendants timely notice following the incident giving rise to the underlying claim.

The motion is granted.

I.

The events underlying this dispute are tragic. On or

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1. Jurisdiction arises from the parties' diversity of citizenship. It is undisputed that New York law controls because the controlling contracts were made here and because the parties' principal place of business is here.

about the morning of December 23, 1985, five people--a , young couple, their infant child and the wife's parents--died in their home as a result of carbon monoxide poisoning caused by an improperly installed gas furnace. The insured company, Mobile Gas Service Corp., earlier had received a number of service complaints and had detected the furnace's improper installation, but had failed to correct the problem.

Mobile Gas was insured against liability from such incidents as follows:

1) Liberty Mutual Insurance Company was the primary insurer, with full responsibility for the initial $300,000 in liability for any claim.

2) American Home insured Mobile Gas for the first layer of excess liability up to $5 million above the $300,000 covered by Liberty Mutual.

3) Mobile Gas was covered by a further layer of $10 million for liability in excess of the $300,000 and $5

million policies. Liability for this second excess layer was divided among several insurers. Republic was responsible for ten per cent of the layer (i.e. up to $1 million on a full $10 million obligation), United National for an additional ten per cent, and American Home and other insurers not party to this action for the remaining eighty per cent.

On December 30, 1986, American Home agreed in principle to settle the underlying claims for $11,500,000. In this suit, acting as subrogee of Mobile Gas, it is suing Republic and United National for their respective shares of the second layer of excess insurance. Republic and United National on this motion assert the defense of untimely notice of the cliam.

The record establishes that: the claims arose in December 1985; by January 10, 1986 at the latest Mobile Gas knew of its substantial culpability in the deaths; by February 12, 1986 American Home received notice of the claims; nevertheless Mobile Gas never notified Republic

and United National; the defendants first learned of the claims on, respectively, January 21, 1987 (after a settlement had been negotiated) and November 10, 1986 (after extensive settlement negotiations had occurred).

* * * * * * *

The Republic and United National policies contained essentially identical provisions requiring the insured to provide the insurers with a "notice of

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2. Condition 3 of Republic's policy provides: "Whenever the insured has information from which they may reasonably conclude that an occurrence covered hereunder involves injuries or damage which, in the event the insured shall be held liable, is likely to involve this policy, notice shall be given to [Republic's agent], as soon as practicable, provided, however, that failure to give notice of any occurrence which at the time of its happening did not appear to involve this policy but which, at a later date, would appear to give rise to claims hereunder, shall not prejudice such claims."

Condition 2 of United National's policy provides: "Notice of an occurrence which appears likely to involve this policy shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. The company at its own option may, but is not required to, participate in the investigation, settlement or defense of any claim or suit against the insured."

occurrence" "as soon as practicable" upon obtaining information idicating that the policy likely would be involved.[2] By the terms of the policies, the notice of occurrence provisions are conditions precedent to coverage: non-compliance results in forfeiture of the insured's right to recover on the policy.

In the insurance industry, a distinction is made between direct insurers, which issue policies directly to insured persons or entities, and reinsurers, which contract with direct insurers to reimburse them for successful claims brought on direct policies. Direct insurance policies can either cover entire claims or restricted portions of claims, as in the present case where Liberty Mutual covered the initial $300,000 in liability and other insurers provided layers of coverage against liability in excess of that amount.

[1] New York law confirms that notice requirements in all direct insurance contracts are binding. *See Utica Mutual Ins. Co. v. Fireman's Fund Ins. Cos.*, 748

F.2d 118, 121 (2d Cir. 1984) ("Compliance with the notice requirements set forth in an insurance contract is a condition precedent to recovery under New York law and failure by the insured to comply with such requirements relieves the insurer of liability"). The law is clear that direct insurers need not demonstrate prejudice to assert a defense of untimely notice, *seeOlin Corp.,v. Ins. Co. of North America,* 929 F.2d 62, 64 (2d Cir. 1991); *see also Security Mut. Ins. Co. v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436, 440, 293 N.E.2d 76, 79, 340 N.Y.S.2d 902, 905 (1972), although there exists some uncertainty whether reinsurers must demonstrate prejudice to prevail on such a defense. *See Unigard Security Ins. Co., Inc. v. North River Ins. Co.*, 949 F.2d 630 (2d Cir. 1991) (order certifying question of prejudice as element of timeliness defense for reinsurers to New York Court of Appeals, but noting that prejudice need not be shown by direct insurers under *Security Mutual, supra*).

[2] American Home contends, without citing any relevant authority, that second-layer excess insurers such as Republic and American Home should be viewed as reinsurers rather than direct insurers. Its argument is without merit. The Court of Appeals for this Circuit, applying New York law, recently reaffirmed that direct insurers need not show prejudice and applied that rule to affirm dismissal of claims against providers of "primary or excess comprehensive liabilty coverage." *Olin Corp. v. Ins. Co. of North America*, 929 F.2d 62, 63 (2d Cir. 1991). Moreover, American Home's position is based on a false premise: that excess insurers are not actively involved in litigaiton or settlement of the claims and therefore have no need for prompt notice. The argument is belied by the fact that in this case American Home itself is an excess insurer only, albeit one layer removed from defendants, and yet was the primary negotiator that settled the underlying claims, and by the fact that United National's policy

specifically provided that the firm at its option could participate in the defense and settlement of claims. Finally, Republic and American Home had a strong interest in the outcome of settlement negotiations since the figure arrived at fell within the layer of coverage which they provided.

[3] Accordingly, the dispositive question is whether Republic and United National have shown, consistent with the standards applicable on motions for summary judgment, that Mobile Gas or American Home failed to provide timely notice upon learning that it appeared the second excess layer of insurance was likely to be involved, as required by the policies. The first notice of any kind, a "reinsurance advice," was sent by American Home on October 28, 1986, and received by United National on November 10, 1986 and by Republic on January 30, 1987 after the initial notice was mistakenly sent to a company unrelated to Republic.[3]

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3. Republic's first notice of any kind occurred on January 21, 1987, when it received a telephone call from a United National representative to discuss the settlement that had been negotiated by American Home.

There is no dispute that Mobile Gas knew of its exposure to substantial liability by January 10, 1986 at the latest. The company conducted a preliminary investigation and in a December 26, 1985 report concluded that it bore significant responsibility for the events. On January 10, 1986, the law firm of Inge, Twitty, Duffy & Prince provided a report to Mobile Gas's primary insurer, Liberty Mutual, which concluded, "Mobile Gas has exposure in this case." These initial reports did not discuss the likely extent of eventual liability, although according to American Home's legal brief, its statement of uncontested facts pursuant to Local Rule 3(g) and its counsel's affidavit in

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4. None of these sources constitute evidence cognizable on a motion for summary judgment; moreover, because plaintiff has not provided a copy of any complaints referred to, it is possible that the $5 million ad dammum clause referred solely to compensatory damages. Punitive damages apparently also were asserted. See Affidavit of Scott Seskin, August 16, 1991, Ex. E (American Home reinsurance avise of October 28, 1986 indicating that plaintiffs' demand for settlement was $25,000,000 and that "[p]unitive damages are insurable in the State of Alabama and are covered under our policy').

opposition to this motion,[4] the complaints filed by the victims' estates demanded a total of $5 million. According to American Home, it was advised of the claims in February 1986.

The record leaves ensuing events unclear. Inge, Twitty prepared a report addressed to American Home dated August 29, 1986, which referred to earlier discussions between the firm and American Home. That report described the claims as "very serious and [carrying] the probability of a huge recovery by plaintiffs." The report stated, "we don't feel there is any effective defense to these claims on behalf of your insured, Mobile Gas Service Corporation," and that "[t]he probability of an adverse verdict against Mobil Gas Service Corporation in this case is 100%." In a report dated September 22, 1986, Inge, Twitty advised American Home that there was a "probability that these cases can be settled in the $10,000,000 to $15,000,000 range."

On October 23, 1986, an American Home claims adjustor conducted a settlement meeting at which the victims demanded $12,500,000 in satisfaction of the pending claims. American Home's adjustor apparently mistakenly believed that secondary direct insurers like Republic and United National were in fact reinsurers who were not essential parties to the litigation or settlement talks. *See* April 17, 1990 letter of Ralph Carlsen of American Home to Raymond Freidberg of United National, Ex. F to Affidavit of Andrew Entwistle, June 17, 1991 (explaining how American Home "goofed" in handling case). On December 30, 1986, plaintiffs and American Home agreed in principle to a final settlement of $11,500,000, with a January 22, 1987 deadline for final acceptance by plaintiffs. Republic and United National played no role in those negotiations.

The record establishes that despite the extensive activity in the underlying case, neither Republic nor United

National received any notice of th underlying claim until after American Home's October 1986 settlement negotiations, and neither ever received notice directly from Mobile Gas. The first notice of any kind United National has record of receiving concerning the claim was a "Reinsurance Advice" from American Home, dated October 28, 1986 (five days after American Home's negotiations discussing a possible settlement of $12.5 million) and received November 10, 1986. Similarly, Republic's files contain a "Reinsurance Advice" from American Home dated October 28, 1986, but not received until January 30, 1987 as an attachment to a letter, apparently because American Home initially sent the notice to a company unrelated to Republic's designated agent. According to Republic, its first knowledge of the underlying case came on January 21, 1987, when a representative of United National telephoned to inquire how Republic intended to respond to American Home's

settlement of the underlying case.

The affidavits and documents submitted by defendants, in conjunction with plaintiff's failure to provide evidence of earlier notice, establish that neither defendant received notice at least until after extensive settlement discussions had been held, and at least ten months after Mobil Gas knew of the claims against it. Despite a few indications to the contrary--including American Home's inadequately supported contention that the victims' initial suits demanded a total of only $5 million, the fact that the first documentary evidence attaching a firm dollar figure to Mobile Gas's liability was dated September 22, 1986, and American Home's argument that its first indication that the claimants' recovery would reach the second excess layer came in October negotiations--it is inconceivable that a reasonable insured or insurance company, much less sophisticated and experienced litigants like Mobile Gas or American Home, could not have realized within days of the

deaths of five people, for which Mobile Gas was clearly responsible, that there existed a serious likelihood of a recovery over $5,300,000, which would implicate the Republic and United National policies. No reasonable jury could conclude otherwise.

Accordingly, even if we were to consider the October 28, 1986 "reinsurance advice" from American Home (rather than from Mobile Gas as the policy required) as substantively adequate notice under the policies, the ten-month delay from the insured's knowledge of its exposure to the notification of its insurers violated the timely notice of occurrence requirement of those policies.

[4] Moreover, even the one-month delay between September 22, 1986, when American Home was specifically advised by its counsel of a likely recovery of $10 million to $15 million, and October 28, 1986, when it sent notice to Republic and United National of the claim, failed to meet the policies' requirment that notice be

afforded "as soon as practicable," particularly because during that time settlement negotiations obviously bearing on defendants' interests were being conducted without their knowledge, and in Republic's case were completed before it had any knowledge of the victims' claim.

[5] American Home contends that even if its notice to defendants was untimely, defendants' failure to disclaim coverage promptly waives their defense as a matter of New York law. *See* New York State Ins. Law § 3420(d) (McKinney's 1985). However, that statute applies by its own terms only to injuries "occurring within this state." This provision specifically has been held not to apply to accidents that occurred outside New York, *see, e.g. Ogden Corp. v. Travelers Indem. Co.*, 739 F.Supp. 796, 803-04 (S.D.N.Y.1989), *aff'd* 924 F.2d 39 (2d Cir. 1991), and accordingly provides no defense in this case, in which the underlying claim arose in Alabama.

In sum, there is no material factual question as to

the length of delay prior to the notification of Republic and United National. No reasonable jury could find that the delay did not render the notice untimely within the meaning of the policies. Accordingly, the motion for summary judgment is granted and the complaint is dismissed.

It is so ordered.

APPENDIX C
United States Court of Appeals
For The
Second Circuit

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of January, one thousand nine hundred and ninety-three.

PRESENT: HON. ELLSWORTH A. VAN GRAAFEILAND
HON. GEORGE C. PRATT
HON. FRANK X. ALTIMARI
Circuit Judges.

AMERICAN HOME ASSURANCE COMPANY,
Plaintiffs-Appellant,

-v.-

REPUBLIC INSURANCE COMPANY and UNITED NATIONAL INSURANCE COMPANY,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the order of said district court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

ELAINE B. GOLDSMITH, Clerk
By: s/ Edward J. Guardaro
Edward J. Guardaro
Staff Attorney

A TRUE COPY
ELAINE B. GOLDSMITH, Clerk
By s/ Kathy Brown
Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
JAN 22 1993
ELAINE B. GOLDSMITH, CLERK

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN HOME ASSURANCE COMPANY,
Plaintiff,

-against-

REPUBLIC INSURANCE COMPANY and
UNITED NATIONAL INSURANCE COMPANY,
Defendants.

Defendants having moved for summary judgment against plaintiff for failure of either the insured or American Home to provide defendants timely notice following the incident giving rise to the underlying claim, and the said motion having come before the Honorable MORRIS E. LASKER, U.S.D.J., and the Court thereafter

on April 3, 1992, having handed down its opinion (#69600); granting the motion for summary judgment, and dismissing the complaint, it is,

ORDERED, ADJUDGED AND DECREED: That defendants' motion for summary judgment be and it is hereby granted, and it is further,

ORDERED, that the complaint be and it is hereby dismissed.

s/ James M. Parkison
Clerk

DATED: NEW YORK, NEW YORK
April 14, 1992